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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,

Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Whether the right to an impartial tribunal, guaranteed by the Due Process Clause of the Fourteenth Amendment, is violated when a state trial judge continues to preside over a case after receiving substantial payments during the pendency of the case from counsel for a party to the case.

PARTIES INVOLVED

In addition to the parties listed in the caption, Cowin Equipment Company is a party to the underlying case pending in the trial court. Petitioner is Grove North America, Division of Kidde Industries, Inc., and its parent corporation is Hanson, P.L.C. Petitioner has no subsidiaries that are not wholly owned.

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v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Grove North America, Division of Kidde Industries, Inc., a corporation ("Grove"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

ORDER BELOW

The order of the Supreme Court of Alabama denying Grove's petition for a writ of mandamus seeking disqualification of the state trial judge (App., *infra*, 1a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on March 22, 1994. Grove's motion for rehearing was

denied on April 18, 1994. App., *infra*, 3a. On July 11, 1994, Justice Kennedy signed an order extending the time for filing a petition for a writ of certiorari to and including August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts Material To The Question Presented

This petition arises out of a products liability action brought on May 1, 1991, by respondent Richard Douglas Lowe ("Lowe") against Grove and Cowin Equipment Company ("Cowin") in the Circuit Court of Jefferson County, Alabama. Lowe alleges that he sustained injuries as a result of a defect in a crane manufactured by Grove and sold by Cowin. Lowe is represented in this case by the law firm of Hare, Wynn, Newell & Newton ("Hare, Wynn"). The case is set for trial on November 14, 1994.

This case was assigned to Judge Roger Monroe of the Jefferson County Circuit Court. During 1990, while a private practitioner, Judge Monroe had referred a number of his civil clients to the Hare, Wynn firm. Thereafter, he campaigned for and was elected to the Jefferson County Circuit Court. Hare, Wynn was Judge Monroe's second largest contributor in that campaign, contributing a total of $8,000 (App., *infra*, 6a), more than ten percent of the judge's total contributions.

On March 1, 1991, shortly before the commencement of this case, Hare, Wynn paid Judge Monroe $2,136 as a "referral fee" for a case that Judge Monroe had referred to the firm

before being elected to the bench. App., *infra*, 4a, 6a. Grove is informed and believes that the client in that case, Lisa Lewis, served as Judge Monroe's campaign manager and treasurer when he ran for his position as Circuit Judge, and that Ms. Lewis also currently serves as Judge Monroe's office assistant.

On June 4, 1992, while this case was pending before Judge Monroe, the Hare, Wynn firm paid Judge Monroe an additional $23,937.33. App., *infra*, 4a, 6a. That amount constituted the "referral fees" resulting from the resolution of the claims of two other clients that had previously been referred to the firm by the judge while he was still in private practice. *Id.* at 4a, 6a. Thereafter, in 1993, Hare, Wynn contributed $5,000 to Judge Monroe to support his campaign (which is still ongoing) for election to the Alabama Court of Civil Appeals.

Neither Judge Monroe nor Hare, Wynn disclosed to Grove that they had a substantial financial relationship during the pendency of this case. In particular, neither Judge Monroe nor the firm informed Grove that Hare, Wynn was obligated to Judge Monroe for referral fees during the pendency of this case or that the firm made large payments to the judge both shortly before filing suit and also while the case was pending before the judge.

In September 1993 Grove learned of one of these payments to Judge Monroe. Accordingly, on October 7, 1993, Grove filed a motion to recuse Judge Monroe from presiding over this case. After obtaining discovery from the Hare, Wynn firm about the extent of the financial relationship between the firm and Judge Monroe, Grove filed an amended motion on December 6, 1993, setting forth the facts discussed above.

On December 10, 1993, Judge Monroe denied Grove's motion and amended motion for recusal from the bench; no

written opinion was issued.[1] Grove then filed a petition for writ of mandamus in the Supreme Court of Alabama, asking that court to direct Judge Monroe to disqualify himself from further participation in this case. The Supreme Court of Alabama denied the petition without opinion on March 22, 1994. App., *infra*, 1a. As noted above, this case is presently scheduled to go to trial before Judge Monroe on November 14, 1994.

B. How The Federal Question Was Raised

In its motion to recuse Judge Monroe, Grove specifically relied on federal due process principles and cases applying those principles. For example, Grove quoted *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)), for the proposition that, under the circumstances of this case, "disqualification is rightly required so that 'justice [will] satisfy the appearance of justice.'" Defendant Grove North America's Memorandum Brief In Support Of Motion For Recusal ("Trial Ct. Br.") at 3. *In re Murchison* and *Offutt v. United States*, of course, set forth the standard for disqualification of judges under the Due Process Clause (*see Murchison*, 349 U.S. at 136; *Offutt*, 348 U.S. at 14-15), and Grove's quotation of the rule laid down in those cases therefore constitutes express reliance on the Due Process Clause.

Similarly, Grove's recusal motion relied on this Court's due process analysis in *Murchison*, 349 U.S. at 136, for the proposition that "[t]he reasonable person/appearance of impropriety test . . . may '[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *See* Trial Ct. Br. at 2. These explicit references to due process cases and doctrines plainly "sufficed to alert

[1] More than 20 judges sit on the Jefferson County Circuit Court. *See Alabama Judicial System: 1993 Annual Report* 80. As a result, there would have been no difficulty in reassigning the case to a different judge if Judge Monroe had granted Grove's recusal motion.

the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978); *see also Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment*, 347 U.S. 590, 599 (1954); *cf. New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 69 (1928) (finding federal claim properly preserved where state court cited Fourteenth Amendment cases from this Court in rejecting challenge to a state statute).

By the same token, Grove properly raised its due process claim in the Supreme Court of Alabama. Indeed, Grove's petition for mandamus contains the same quotations from *Murchison* and *Offutt* as those set forth above and relies to the same extent on the due process analysis of those cases. *See* Petitioner Grove North America's Memorandum Brief In Support Of Petition For Mandamus ("Sup. Ct. Br.") at 3 (quoting *Murchison*, 349 U.S. at 136, for the proposition that "[t]he reasonable person/appearance of impropriety test . . . may '[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'"); Sup. Ct. Br. at 5 (quoting *Murchison*, 349 U.S. at 136, and *Offutt*, 348 U.S. at 14, for the proposition that "disqualification is rightly required so that 'justice [will] satisfy the appearance of justice'").

Moreover, Grove's mandamus petition also relied on *Ex parte White*, 300 So.2d 400, 429 (Ala. App.), *cert. denied*, 300 So.2d 439 (Ala. 1974), for the proposition that "'[i]mplanted in the foundation of public policy is the general rule that no judge shall preside in a case in which he is not wholly free, disinterested, and independent.'" Sup. Ct. Br. at 5. The only case cited by *Ex parte White* for that proposition is another one of this Court's due process cases, *Tumey v. Ohio*, 273 U.S. 510 (1927). *See White*, 300 So.2d at 429. In addition, *White* contains an extensive discussion of the due process requirement of a fair tribunal. *Id.* at 429 (citing *Murchison*, *Offutt*, and *Tumey*, and noting that "[t]his rule is basic in the Constitution of our United States"). Thus, Grove clearly

and unquestionably raised its due process claim in the Alabama Supreme Court.[2]

The courts below did not expressly address Grove's due process claim.[3] This Court has made clear, however, that it will review federal questions that were "*either* raised or squarely considered" in a state court. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (emphasis added); *see United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' . . . . [T]his rule operates (as it is phrased) in the disjunctive"). Accordingly, because Grove's due process claim was "pressed" in the courts below, it is properly before this Court.

C. The Decision Below Is Final

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In this case, the Supreme Court of Alabama's denial of Grove's petition for a writ of mandamus constitutes a final judgment or decree for purposes of Section 1257(a).

To be sure, the underlying products liability action giving rise to this petition is still pending in the state trial court. That fact does not, however, affect the finality of the decision

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[2] Grove also raised this issue in its motion for rehearing in the Alabama Supreme Court, arguing that "Judge Monroe's participation in this case violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment." Motion For Rehearing at 3.

[3] The Supreme Court of Alabama's failure to explain the basis for its rejection of Grove's due process claim is reminiscent of that court's similar unwillingness to review the merits of Justice Embry's failure to recuse himself in *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), *vacated*, 475 U.S. 813 (1986). *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986) (noting that "each justice [of the Supreme Court of Alabama] . . . voted individually on the matter of whether he should recuse himself").

below. To the contrary, this Court's precedents make clear that this case is final for two independently sufficient reasons.

1. In the first place, the decision below is final because Alabama procedure does not afford Grove any further opportunity to litigate its federal claims. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that a state court's decision will be deemed final for jurisdictional purposes "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. This case falls squarely within that category: the Alabama courts have now finally rejected Grove's due process claim, and Alabama law precludes Grove from obtaining later review of that claim.

The Supreme Court of Alabama has "long held that mandamus, not appeal, is the proper remedy if a judge refuses to recuse himself." *Ex parte Balogun*, 516 So.2d 606, 608 (Ala. 1987) (citing cases); *see, e.g.*, *Ex parte Kiker*, 612 So.2d 453, 455 (Ala. 1993); *Ex parte Melof*, 553 So.2d 554, 555 (Ala. 1989); *cf. Ex parte Central States Health & Life Co. of Omaha*, 594 So.2d 80, 81 (Ala. 1992) (holding that review of a lower court's ruling on a motion to disqualify an attorney "is by a petition for writ of mandamus only"). In *NAACP v. Alabama*, 150 So.2d 677 (Ala. 1963), *rev'd on other grounds*, 377 U.S. 288 (1964), the court applied that principle in refusing to consider a recusal issue on an appeal from a final judgment where the same issue had previously been raised by way of petition for writ of mandamus. *See id.* at 681 ("We hold that appellant cannot now raise the [recusal] question on appeal which it had raised in the mandamus proceeding"). These cases make clear that Grove is precluded from obtaining further review in the Alabama courts, and accordingly the decision below is final under *Cox Broadcasting Co.*

2. The decision below is also final because it involves a collateral matter, unrelated to the subject matter of the underlying case. It is well settled that this Court will treat "as final for its jurisdictional purposes a state court judgment which conclusively disposes of a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy." R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* 96 (7th ed. 1993); *see, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (holding that state supreme court's rejection of federal venue defense was "final" for purposes of 28 U.S.C. § 1257 even though the case had yet to go to trial). In this case, the Supreme Court of Alabama has "conclusively dispose[d]" of Grove's due process claim by denying its petition for a writ of mandamus; the disqualification issue is entirely unrelated to the underlying products liability action, and thus is "distinct from the general subject of the litigation"; and the recusal issue involves only the parties to this case.

In view of these authorities, it is apparent that the Supreme Court of Alabama's denial of Grove's petition for a writ of mandamus amounts to a final adjudication of Grove's due process challenge to the continued involvement of Judge Monroe in this case. Accordingly, the ruling below is final, and this Court has jurisdiction to review Grove's federal claim.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court Of Alabama's Rejection Of Grove's Due Process Claim Conflicts With Applicable Decisions Of This Court

"[A] fair tribunal is a basis requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see, e.g., Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). "Fairness of course requires an absence of actual bias in the trial of cases." *Murchison*, 349 U.S. at 136. But due process requires more

than impartiality in fact; even an *appearance* of bias on the part of a judicial officer can violate the Due Process Clause. *Id.* As a consequence, the requirements of due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). *Accord Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

Accordingly, the Due Process Clause requires disqualification of a judge whenever the "'situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 822 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *accord Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 865 n.12; *Murchison*, 349 U.S. at 136. Under that standard, judicial officers in the position of Judge Monroe must be disqualified so that "'justice [will] satisfy the appearance of justice.'" *Id.*

That the Due Process Clause requires disqualification in the circumstances of this case is made plain by this Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968). In that case, which involved a challenge to an arbitration award, the supposedly "neutral" arbitrator had had a "sporadic" but "significant" business relationship with a prime contractor that was a party to the arbitration. *Id.* at 146. The relationship "involv[ed] fees of about $12,000 over a period of four or five years," but "there had been no dealings between them for about a year immediately preceding the arbitration." *Id.* Neither the arbitrator nor the prime contractor revealed the prior business dealings to the other party.

Applying the test laid down in *Tumey v. Ohio* and its progeny, this Court had little difficulty in concluding that the Due Process Clause would forbid a judge from presiding over a case in such circumstances: "We have no doubt that if a litigant could show that . . . a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge." 393 U.S. at 148 (citing *Tumey*).[4] Declining to hold arbitrators to a lesser standard in these circumstances,[5] the Court concluded that the arbitrator was disqualified and that the arbitration award was invalid.[6]

Commonwealth Coatings plainly mandates disqualification in the circumstances of this case. Here, Judge Monroe referred at least three clients to Hare, Wynn (evidently in exchange for potential referral fees), and later received substantial fees from the firm both before and during the pendency of this lawsuit in which the firm represents a party.

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[4] The *Commonwealth Coatings* Court also went on to suggest that disqualification should be required where there is "'the slightest pecuniary interest' on the part of the judge" (393 U.S. at 148), a suggestion that was rejected in later cases. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 825 n.3. The Court's rejection of that aspect of *Commonwealth Coatings* does not, of course, undermine the other portions of *Commonwealth Coatings* discussed in text.

[5] In a concurring opinion, Justice White (joined by Justice Marshall) refused to join the other four members of the majority in holding that arbitrators are subject in all circumstances to the same stringent standards applicable to judges. *See* 393 U.S. at 150 (White, J., concurring). Justice White did agree, however, that even an arbitrator is disqualified where he or she has a non-trivial business relationship with a party and fails to disclose that relationship. *Id.*

[6] Because *Commonwealth Coatings* involved an arbitrator rather than a judge, the governing standard for disqualification was that set forth in the Federal Arbitration Act, 9 U.S.C. § 10(b), rather than the Due Process Clause. Nonetheless, *Commonwealth Coatings* is controlling on the due process issue in this case, because the Court construed the statute by analogy to constitutional requirements. *See* 393 U.S. at 148 (looking to *Tumey v. Ohio* for guidance in ascertaining the obligations of arbitrators under the Federal Arbitration Act).

Moreover, it is undisputed that "neither [Judge Monroe] nor [Hare, Wynn] gave to [Grove] even an intimation of the close financial relations that ha[ve] existed between them for a period of years." 393 U.S. at 147-48. Just as in *Commonwealth Coatings*, therefore, there can be "no doubt" that Judge Monroe's continued participation in this case is impermissible. *Id.* at 148.

The necessity for disqualification is considerably greater in this case than it was in *Commonwealth Coatings*, because the concealed financial relationship at issue here was not limited to pre-adjudication conduct but in fact continued during the pendency of this litigation.[7] Thus, *Commonwealth Coatings* makes clear that the Due Process Clause forbids Judge Monroe's continued participation in this case. Accordingly, this Court should grant certiorari to review the decision of the Supreme Court of Alabama, which rejects Grove's due process claim "in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

B. The Supreme Court Of Alabama's Rejection of Grove's Due Process Claim Conflicts With The Decisions Of Other Federal And State Appellate Courts

The decision below is inconsistent with numerous decisions of other appellate courts. In the first place, other state

[7] To be sure, the arbitrator's relationship in *Commonwealth Coatings* was with an actual party, whereas Judge Monroe's relationship is with the law firm representing the plaintiff in this case. That distinction is of no consequence, however, because it is a matter of common knowledge that counsel for plaintiffs in products liability suits generally have a direct interest in the outcome of those cases. The appearance of impropriety is, therefore, just as great as it would be if Hare, Wynn were a party rather than counsel for a party. *See Johnston v. Security Ins. Co.*, 6 Cal. App. 3d 839, 843, 86 Cal. Rptr. 133 (1970); *see also Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110-12 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *In re Fiftieth Dist. Court Judge*, 483 N.W.2d 676, 679 (Mich. App. 1992); *Caleffe v. Vitale*, 488 So.2d 627, 629 (Fla. App. 1986).

and federal courts have held that the existence of comparable business relationships between a judicial officer and a party or attorney requires the judge's disqualification. In addition, at least one court has held, and others have suggested, that a judge cannot preside over a case after accepting a substantial campaign contribution from counsel for one of the parties. Certiorari is therefore warranted to resolve these conflicts.

1. A number of state and federal courts have concluded that business connections closely analogous to the relationship at issue in this case require disqualification of the judge. For example, in *In re Fiftieth Dist. Court Judge*, 483 N.W.2d 676 (Mich. App. 1992), the trial judge had a joint ownership interest in the property on which was located the offices of the law firm for one of the parties, and had received compensation from the law firm in the form of the firm's assumption of mortgage payments on that property. The court held that recusal was required, explaining: "We believe that where, as here, the judge's economic relationship with a law firm is more than de minimis, *automatic disqualification is required.*" 483 N.W.2d at 679 (emphasis added). By the same token, Judge Monroe's substantial and ongoing financial relationship with Hare, Wynn, involving long-term financial obligations for referral fees that culminated in substantial payments, was plainly "more than de minimis" and should have resulted in "automatic disqualification."

Similarly, in *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), the court was faced with a claim that a district judge's relationship with the attorney for one of the parties created an appearance of partiality requiring recusal. The judge had invested in unrelated real estate ventures with the attorney, and the attorney had represented the judge in litigation matters related to those investments. The Fifth Circuit held that recusal was required, explaining: "We believe that a reasonable person with knowledge of the business investments of [the judge] and [the attorney] and the legal representation of the judge

by [the attorney] might very well question the judge's impartiality in a trial involving [the attorney] as chief counsel for a litigant." 609 F.2d at 1111.[8]

In the present case, the financial relationship entailed by the referral fee arrangement was much closer than that at issue in *Potashnick*: the extent of Judge Monroe's ultimate compensation depended directly on the efforts and success of Hare, Wynn in the referred cases. Moreover, the judge's campaign manager and office administrator was one of the clients referred by the judge and represented by the firm, further strengthening the close relationship involved in this case. Under *Potashnick*, recusal was plainly required.

Numerous other courts have reached the same result in analogous circumstances.[9] In a few instances, however, courts

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[8] The *Potashnick* court applied 28 U.S.C. § 455(a), rather than the Due Process Clause, in concluding that recusal was required. As the court recognized, however, Section 455(a)—which requires recusal whenever a judge's "impartiality might reasonably be questioned"—is essentially an "appearance of impartiality" statute. 609 F.2d at 1111. Like Section 455(a), the Due Process Clause also focuses on "appearance[s]" (*Offutt v. United States*, 348 U.S. at 14), and requires recusal even absent actual bias where a judge's relationship with the case or the participants therein "'"offer[s] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 822. Thus, *Potashnick* is directly relevant to the due process issue in this case.

[9] *See, e.g., Fein v. Fein*, 610 N.Y.S.2d 1002, 1004-06 (Sup. Ct. 1994) (refusing to enforce arbitral award where arbitrator had had long-term financial dealings with a party involving up to $5,000); *James D. Morrisey, Inc. v. Gross Construction Co.*, 443 A.2d 344, 348-49 (Pa. Super. 1982) (holding that arbitrator should have disqualified himself because he failed to disclose fact that he had continuing business relationship with a party) (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968)); *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 220-21, 224 (N.J. 1981) (disqualifying arbitrator and vacating arbitral award where arbitrator had performed services for a party and as a result was owed sub-

[Footnote continued on next page]

have agreed with the Alabama Supreme Court that financial relations between a judge and a party or attorney like those at issue in this case do not require disqualification.[10] This Court should grant certiorari to resolve this widening conflict. *See* Sup. Ct. R. 10.1(b).

2. There is also considerable judicial disagreement over the question whether a judge is disqualified by his or her acceptance of political contributions from counsel to a party in a pending case. In this case, of course, Judge Monroe had accepted $8,000 in campaign contributions from Hare, Wynn prior to the commencement of the lawsuit, and thereafter he accepted an additional $5,000 in contributions from the firm. Nonetheless, the Supreme Court of Alabama held that these contributions were not sufficient to require the judge's disqualification as a matter of due process.[11]

[Footnote continued from previous page]

stantial sums of money by the party during the pendency of the arbitration proceeding) (citing *Commonwealth Coatings, supra*); *Johnston v. Security Ins. Co. of Hartford*, 6 Cal. App. 3d 839, 843-44, 86 Cal. Rptr. 133 (1970) (vacating arbitral award because arbitrator failed to disclose fact that he had repeatedly referred cases to one party's expert witness) (citing *Commonwealth Coatings, supra*); *see also Schmitz v. Zilveti*, 20 F.3d 1043, 1048-49 (9th Cir. 1994); *In re Drexel Burnham Lambert Inc.*, 869 F.2d 116, 119-20 (2d Cir.) (Newman, J., dissenting from denial of rehearing en banc), *cert. denied*, 490 U.S. 1102 (1989); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1199-1202 (11th Cir. 1982); *Matter of Lawrence*, 335 N.W.2d 456, 458-59 (Mich. 1983).

[10] *See, e.g., United States v. Couch*, 896 F.2d 78, 79-82 (5th Cir. 1990) (finding no due process violation where trial judge had joint investments with moving party); *In re Beard*, 811 F.2d 818, 830-31 (4th Cir. 1987) (declining to disqualify judge based on his financial and legal connections with counsel for a party).

[11] Justices of the Supreme Court of Alabama are unlikely to perceive campaign contributions as occasions for disqualification since they must also run for office and regularly solicit and accept substantial campaign contributions from law firms. *Mobile Register*, July 17, 1994, at p. 1.

A number of other state appellate courts have held that an attorney's campaign contributions to a judge, standing alone, will not necessarily require disqualification of the judge. *See, e.g., MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335-38 (Fla. 1990); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 844-45 (Tex. App. 1987), *cert dismissed*, 485 U.S. 994 (1988).[12] In *Brown v. Brown*, 397 S.E.2d 545 (Va. App. 1990), however, the Court of Appeals of Virginia concluded that recusal was required when a commissioner in chancery (a quasi-judicial officer responsible for preparing a report for submission to the trial judge) accepted a $500 campaign contribution from counsel for a party during the pendency of the case. *See* 397 S.E.2d at 547-48 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954), for the proposition that "justice must satisfy the appearance of justice"). *Brown* is squarely inconsistent with the holding of the Supreme Court of Alabama in this case.

Similarly, in *In re Mason*, 916 F.2d 384 (7th Cir. 1990), the court held that a judge's past campaign contributions to parties in a case did not require disqualification, but went on to observe that "we might have a much more difficult case if, as occurs in many states, the attorney gave significant financial support to the judge's campaign committee *while the judge was on the bench. Such contributions create opportunities to curry favor, and large ones could require disqualification.*" *Id.* at 387-88 (emphasis added). *See also*

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[12] Even these courts generally recognize that the combination of campaign contributions and other factors may give rise to an appearance of impropriety requiring disqualification. *See, e.g., MacKenzie v. Super Kids Bargain Store*, 565 So.2d at 1338 n.5 ("Although a motion for disqualification based *solely* upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion."). *See also* S.D. Stat., tit. 16, ch. 16-2, App., Canon 5C(2), commentary ("Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification").

Breakstone v. MacKenzie, 561 So.2d 1164, 1166-72 (Fla. App. 1989) (concluding that counsel's campaign contribution to judge's spouse required disqualification), *quashed in pertinent part*, 565 So.2d 1332 (Fla.), *and vacated in pertinent part*, 571 So.2d 32 (Fla. App. 1990). In short, the lower federal and state courts are in sharp disagreement over the correct answer to the question whether a judicial officer may continue to act in a case after accepting substantial campaign contributions from counsel for a party. This case presents an appropriate opportunity for this Court to resolve that disagreement.

C. The Petition Presents An Important Federal Question That Should Be Resolved By This Court

As indicated by the numerous cases cited above, the question whether a financial relationship between a judge and a party or attorney requires disqualification is one that arises with considerable frequency, and one that has left the lower courts in considerable confusion. This Court has not had occasion to address that precise question since 1968, when it decided *Commonwealth Coatings Corp. v. Continental Cas. Co.*, *supra*. Further guidance for the lower courts in this important area is obviously needed.

Moreover, this Court has never addressed the question whether (or under what circumstances) the Due Process Clause requires disqualification of a judge who accepts political campaign contributions from a party's attorney during the pendency of a case. That question has already arisen in several States, and is of obvious importance in view of the numerous States that permit political contributions in support of the electoral campaigns of state judges.[13] Ultimate resolution of that question should not be left to judges who,

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[13] *See, e.g.*, Ala. Code § 17-22A-8; Ariz. Rev. Stat. Ann. § 16-913(E); Fla. Stat. § 105.08(1); Ind. Code § 33-5-5.1-29.5; Md. Elec. Code §§ 1-1(a)(4), 26-9; Nev. Rev. Stat. § 294A.110; N.Y. Code of Prof'l Resp., DR 7-110, 22 N.Y. C.R.R. § 1200.41; S.D. Stat. tit. 16, ch. 16-2, App., Canon 5C(2).

like the Justices of the Supreme Court of Alabama, are themselves necessarily participants in the very practice—solicitation and acceptance of judicial campaign contributions—that is the subject of challenge. Review by this Court is therefore warranted, because in concluding that Judge Monroe can preside over this case despite his receipt and acceptance of substantial campaign contributions from Lowe's counsel, the Supreme Court of Alabama "has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

August 2, 1994

Respectfully submitted.

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* *Counsel of Record*

APPENDIX A

IN THE SUPREME COURT OF ALABAMA
MARCH 22, 1994

1930624

Ex parte Grove North America, Division of Kidde Industries, Inc.

PETITION FOR WRIT OF MANDAMUS

(Re: Richard Douglas Lowe v. Grove North America, Division of Kidde Industries, Inc., et al. (CV-91-3246))

ORDER

The petition for writ of mandamus to be directed to the Honorable Roger Monroe, Judge of the Circuit Court of Jefferson County, Alabama, having been duly filed and submitted to the Court,

IT IS CONSIDERED AND ORDERED that the petition for writ of mandamus is denied.

Almon, Shores, Houston, Steagall, Ingram, and Cook, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-91-3246

RICHARD DOUGLAS LOWE,
Plaintiff

v.

GROVE NORTH AMERICA, Division of
KIDDE INDUSTRIES, INC., a corporation, et al.,
Defendants

CASE ACTION SUMMARY
CONTINUATION

DATE	ACTIONS, JUDGMENTS, CASE NOTES
	* * * * *
12-10-93	Deft's motion for recusal is hereby OVERRULED.
12-10-93	Deft's amended mot. for recusal is also OVERRULED. cc: counsel

/s/ Roger Monroe
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
April 18, 1994

1930624

Ex parte Grove North America, Division of Kidde Industries, Inc.

PETITION FOR WRIT OF MANDAMUS

(Re: Richard Douglas Lowe v. Grove North America, Division of Kidde Industries, Inc., et al. (CV-91-3246))

ORDER

The petitioner having filed an [sic] motion for rehearing of this Court's order denying the petition for writ of mandamus on March 22, 1994, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion for rehearing is denied.

Shores, Houston, Steagall, Kennedy, Ingram, and Cook, JJ., concur.

APPENDIX D

STATE OF ALABAMA)

JEFFERSON COUNTY)

AFFIDAVIT

Personally appeared before me, the undersigned notary public, in and for said county and state, John W. Haley, who is known to me and who, after being duly sworn by me, deposes and says as follows:

1. My name is John W. Haley and I am a partner in the law firm of Hare, Wynn, Newell & Newton.

2. Sometime in the Fall of 1993, I had a conversation with Robert Esdale about cases referred to Hare, Wynn, Newell & Newton by Judge Monroe. Mr. Esdale asked if our firm had paid to Judge Monroe any referral fees after he became a circuit court judge. I told Mr. Esdale that, to my knowledge, I was the only lawyer who had worked with Roger Monroe other than Terrell Wynn. I knew that I had concluded the case of Johnny Williams and Alex Polke v. Chemical Waste Management and had made a payment to Judge Monroe of his share of the referral fee. I told Mr. Esdale that I would check to find out how much was paid to Judge Monroe, when it was paid, and whether Terrell had concluded any cases.

3. I checked our records and found that Judge Monroe had been paid $23,937.33 on June 4, 1992, which was fifty percent of the fees in Williams and Polke v. Chem Waste, and so advised Mr. Esdale. I asked Terrell Wynn if he knew of any cases that had been referred to our firm by Roger Monroe and concluded after he became a circuit judge. I also told him that, to my knowledge and that of Terrell Wynn, there were no other fees that had been paid to him after he became a judge.

4. I have since learned that Patrick Lavette handled a case for Lisa Lewis and Judge Monroe was paid a referral fee of $2,136.99 on March 1, 1991. I did not learn of that fee until December 6, 1993, and was unaware of that case being handled by my office at the time I talked with Mr. Esdale.

I have read the above and foregoing and it is true and correct to the best of my knowledge and belief.

/s/
John W. Haley
Attorney for Plaintiff
HARE, WYNN, NEWELL & NEWTON
Suite 800, Massey Building
290 - 21st Street, North
Birmingham, Alabama 35203
(205) 328-5330

Sworn to and subscribed before me this the 9th day of December, 1993.

/s/
Notary Public

My Commission Expires: 10/31/95

[SEAL]

APPENDIX E

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, ALABAMA

RICHARD DOUGLAS LOWE, et al.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. CV 91-3246
GROVE MANUFACTURING COMPANY,	)	
COWIN EQUIPMENT COMPANY,	)	
INC., et al.	)	
	)	
Defendants.	)	

RESPONSE TO DEFENDANT'S SUBPOENA

COME the Plaintiffs in the above-styled cause, and in response to discovery requested says as follows:

Referral Fees:

YEAR	CASE NAME	REFERRAL FEE	HWN&N FEE
1991	Lewis v. Mitchell	2,136.95	2,136.95
1992	Polke v. ChemWaste	5,960.52	5,960.53
	Williams v. ChemWaste	17,976.81	17,976.82
		$26,074.28	$26,074.30

Political Contributions:

YEAR	AMOUNT
1990	8,000.00
1993	5,000.00

/s/ _____
TERRELL WYNN

OF COUNSEL:
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